across a boundary line. Unfortunately, by sheer weight of authority and sanction of time, the rule must still stand that there can be no recovery for trespass to foreign realty,[5] though even here there is some dissent.[6] Otherwise the one sensible and consistent principle to be applied to personal actions is that laid down by Dicey, that "any right which has been duly acquired under the law of any civilized country is recognized and in general enforced by English courts," unless "the enforcement of such right is inconsistent with the policy of English law." [7]

RECENT CASES.

AGENCY — TERMINATION OF AUTHORITY — POWER COUPLED WITH AN INTEREST. — The plaintiff's intestate delivered to her agent her savings bank book in the defendant bank, together with a power of attorney to deposit and draw money. After her death, but before the defendant learned of her death, the defendant made payments to the agent. There was no evidence of an intention on the part of the intestate to make a gift or pledge to the agent. *Held*, that the bank is liable for the amount paid over, as the power of the agent was not coupled with an interest and was therefore terminated by the death of the principal. *Hoffman, Administrator*, v. *Union Dime Savings Institution*, 109 N. Y. App. Div. 24. See NOTES, p. 287.

AGENCY — UNDISCLOSED PRINCIPAL'S RIGHTS WITH RESPECT TO THIRD PERSONS — OFFER TO CONTRACT ADOPTED BY UNDISCLOSED PRINCIPAL BEFORE ACCEPTANCE. — A, in his own name, made an offer to sell a certain crane to the defendant. The plaintiff then purchased the crane and authorized A to proceed with the transaction as his agent. The defendant afterwards accepted the offer. *Held*, that the plaintiff cannot sue the defendant on the contract. *Mooney* v. *Williams*, 5 N. S. W. 304.

When a simple contract is made by a person acting as agent for an undisclosed principal, that principal may, in certain cases, be sued and sue on the contract in his own name. *Paterson* v. *Gandasequi*, 15 East 62; *Sims* v. *Bond*, 5 B. & Ad. 389. The true basis of this anomalous doctrine seems to be that although the contracting party is really the agent, yet the relations existing *de facto* between the agent and his principal render it just that under certain circumstances the principal be allowed to sue and be sued as if he were the real contracting party. See *Railton* v. *Hodgson*, 4 Taunt. 576, 577 (note). Otherwise the recognized exceptions to an undisclosed principal's liability are wholly illogical. See STORY, AGENCY, 9th ed., § 449. But the agency must at the very latest exist when the contract is closed. Subsequent ratification will not suffice where the agent purports to act as principal. *Keighly, etc., Co.* v. *Durant*, [1901] A. C. 240. It seems, however, that this relationship need not be contemporaneous with the express offer. The offeree theoretically accepts that offer which he has reasonably been led to believe the offerer is making to him at the moment of his acceptance, the offer being regarded as continuing till this time. But at this moment when the theoretical offer is made and accepted, the offerer is agent. The principal may, therefore, have the right to sue. Practically, it is an undesirable formality to require the withdrawal of an offer merely to repeat it immediately in identical language after the offerer has become agent for the undisclosed principal.

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[5] British, etc., Co. *v.* Companhia de Moçambique, [1893] A. C. 602; Allin *v.* Conn, etc., Co., 150 Mass. 560.

[6] Little *v.* Chicago, etc., Ry., 65 Minn. 48.

[7] Dicey, Conflict of Laws 22, 32.

ALIENS — WHETHER A STATE COURT MAY VACATE ITS DECREE OF NATURALIZATION ON ACCOUNT OF FRAUD. — A county court of a state granted to the plaintiff in error, an alien, a certificate admitting him to United States citizenship. This certificate was obtained by a fraudulent representation of the applicant. The county attorney, as officer of this court, petitioned on this ground to have the certificate set aside. *Held*, that the petition cannot be granted. *Peterson* v. *State*, 89 S. W. Rep. 81 (Tex., Civ. App.).

The power to naturalize is vested by the Constitution in Congress, but this power has been conferred by statute upon certain state courts. U. S. Rev. St. § 2165. Such courts, when engaged in admitting aliens to citizenship, are regarded, like true federal courts, as agents of the United States government. *Re Christern*, 43 N. Y. Sup. Ct. 523; *People* v. *Sweetman*, 3 Park. Cr. Rep. (N. Y.) 358. The decrees of naturalization granted by these agent courts have the force and effect of judgments. *Spratt* v. *Spratt*, 4 Pet. (U. S.) 393. As in the case of other judgments, however, the rule is that they may, if obtained by fraud, be set aside at the instigation of the defrauded party. *United States* v. *Norsch*, 42 Fed. Rep. 417. In the present case it is clear that the United States was a party to the original judgment through the medium of the county court. But the question remains, did it continue a party to the petition by the county attorney as agent for such court? If so, the above rule permitting judgments to be set aside on the ground of fraud would apply. The court, in answering this question in the negative, reads strictly, according to the ordinary rule of statutory interpretation, the statute delegating to county courts the power of naturalization. But it has been held that a United States circuit court has power to set aside a similar decree if obtained by fraud; and it may be doubted whether the statute did not intend to grant the same power to the county court. See *Pintsch Compressing Co.* v. *Bergin*, 84 Fed. Rep. 140.

BANKRUPTCY — DISCHARGE — LIABILITIES FOR SUPPORT OF WIFE OR CHILD. — The Act of February 5, 1903, amendatory to the National Bankruptcy Act of July 1, 1898, provided that a discharge in bankruptcy should release a bankrupt from all of his provable debts, except such as are "liabilities . . . for maintenance or support of wife or child." (U. S. Comp. St. Supp. 1903, 411.) *Held*, that this excepting clause does not apply to a debt incurred for the services of a physician called by the husband to attend the wife. *In re Ostrander*, 139 Fed. Rep. 592 (Dist. Ct., E. D., N. Y.).

Under the Act of 1898, by the weight of authority, liabilities incident to support or bastardy orders were not dischargeable in bankruptcy. *In re Baker*, 96 Fed. Rep. 954; *Wetmore* v. *Markoe*, 196 U. S. 68. Nor was a bankrupt's debt arising out of an express contract to support his children discharged. *Dunbar* v. *Dunbar*, 190 U. S. 340. Liabilities, therefore, in the nature of direct enforcements of the common law duty to support wife and child were excepted from discharge, but not those contractual obligations incidentally incurred in the performance of that duty. The excepting clause of the Act of 1903 can scarcely apply to this latter form of liabilities, as such a construction would exempt all debts for family necessaries from discharge in bankruptcy, a result clearly not intended. The clause, therefore, seems to be simply declaratory of the meaning of the Act of 1898, as previously interpreted by the courts, and has been so regarded. See *Wetmore* v. *Markoe*, *supra*. The case at hand, by its decision and *dictum*, confines the clause in question to those direct liabilities entailed by non-performance of the common law duty to support wife and child, and seems sound in its conclusion.

BANKRUPTCY — PREFERENCES — PERFECTING INCHOATE RIGHT TO SECURITY. — The defendant, who held mortgages on the real estate of a bankrupt which had been executed in good faith for contemporaneous loans of money, had them recorded within four months of the commencement of bankruptcy proceedings. By the law of Minnesota such mortgages were not valid against *bona fide* purchasers and attaching and judgment creditors until recorded. *Held*, that the mortgages were not originally preferences, and a failure to record until

within four months of bankruptcy proceedings does not make them so. *Seager* v. *Lamm*, 104 N. W. Rep. 1 (Minn.).

For a discussion of the principles involved, see 18 HARV. L. REV. 606.

CARRIERS — DISCRIMINATION — EXCLUSIVE PRIVILEGES IN RAILROAD STATION GRANTED TO ONE HACK COMPANY. — The plaintiff was lessee of a large Union Station in Chicago. In order to protect its passengers from excessive solicitation by the numerous hackmen who frequented the station platforms, the plaintiff granted to one carriage company the exclusive right to enter the station to solicit passengers. The excluded hackmen, among whom were the defendants, continued to enter the station. The plaintiff sought to have the defendants restrained from so doing, and also from standing upon the adjacent sidewalks to solicit custom. The Circuit Court of Appeals granted an injunction restraining the defendants from entering the station, and from so using the adjoining sidewalks as to interfere with the ingress and egress of passengers. The defendants appealed. *Held*, that this decree must be affirmed. *Donovan* v. *Pennsylvania Company*, 26 Sup. Ct. Rep. 91.

For a discussion of the principles involved, see 19 HARV. L. REV. 144.

CARRIERS — DUTY TO ACCEPT AND CARRY PASSENGERS — BLINDNESS AS GROUND FOR REJECTION. — The plaintiff, a blind man seventy-seven years of age and accompanied by an attendant, sought to purchase a ticket for a railway journey involving two or three changes of cars. The defendant's agent refused to sell it to him unless an attendant was to go with him upon the journey. *Held*, that such refusal was proper. *Illinois Central R. Co.* v. *Allen*, 89 S. W. Rep. 150 (Ky.).

A Mississippi decision quoted and followed by the present case is discussed in 18 HARV. L. REV. 540.

CONFLICT OF LAWS — RIGHT OF ACTION — INFRINGEMENT OF FOREIGN PATENT. — The plaintiff alleged in Victoria, that it owned a patent in New South Wales and that the defendant there infringed it. *Held*, that the court lacks jurisdiction. *Potter* v. *Broken Hill Proprietary Co.*, [1905] Vict. L. Rep. 612. See NOTES, p. 295.

CONSTITUTIONAL LAW — IMPAIRMENT OF OBLIGATION OF CONTRACT — STATUTE ALTERING CHARTER PROVISION AS TO INTERNAL MANAGEMENT OF CORPORATION. — A corporation was chartered under a general law which authorized it to issue preferred stock with the unanimous consent of the stockholders. A general statute subsequently enacted in pursuance of the state's reserved power to alter charters, permitted the issuance of preferred stock with the consent of the holders of two-thirds of the capital stock. The plaintiff, a stockholder, seeks to enjoin the defendant corporation, which has secured the consent of the holders of two-thirds of the stock from issuing preferred stock. *Held*, that the plaintiff is not entitled to an injunction. *Hinckley* v. *Schwarzschild, etc., Co.*, 95 N. Y. Supp. 357.

This decision holds that the state under its reserved power can alter the provisions in a charter which define the scheme of internal organization of the corporation, as distinguished from the rights directly conferred by the state.

For a statement of the opposite view, see 18 HARV. L. REV. 549.

CONSTITUTIONAL LAW — PERSONAL RIGHTS — STATUTORY PROHIBITION OF MARRIAGE BY EPILEPTIC. — A statute prohibited the marriage of an epileptic when the woman is under forty-five years of age. *Held*, that the statute is constitutional. *Gould* v. *Gould*, 61 Atl. Rep. 604 (Conn.).

Though similar statutes exist in Kansas, Michigan, Minnesota, and Ohio, this is believed to be the first decision as to their constitutionality. Legislation prohibiting the marriage of insane persons is not analogous, for sanity is an essential of the natural capacity to contract irrespective of any statutory provision. Statutes prohibiting the intermarriage of cousins and other near relatives, and of whites with negroes, have invariably been held constitutional. *Baity* v. *Cranfill*, 91 N. C. 293; *Lonas* v. *State*, 3 Heisk. (Tenn.) 287. But the Connecticut statute is much more stringent, for instead of merely restricting the choice, it entirely

prohibits marriage to certain persons. Since epilepsy is a disease which often leaves its mark in inferior offspring, the marriage of epileptics is a matter of public concern and of public health. As the statute is reasonable and affects all persons alike within the sphere of its operation, it is clearly justified under the police power. *Barbier* v. *Connolly*, 113 U. S. 27; see 10 HARV. L. REV. 450, 524. Analogous to this is legislation forbidding the sale of liquor to Indians, or ordering the confinement of persons infected with contagious diseases. *Cf.* 11 HARV. L. REV. 414, *Haverty* v. *Bass*, 66 Me. 71.

CONSTITUTIONAL LAW — PRIVILEGES AND IMMUNITIES — RIGHT TO ACT AS EXECUTOR. — *Held*, that a legislative enactment that "no non-resident shall be appointed or act as executor" is not a violation of U. S. Const., Art. 4, § 2, which provides that "the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states." *In re Mulford*, 75 N. E. Rep. 345 (Ill.).

The Supreme Court of the United States has consistently refused to define these "privileges and immunities" or to describe them in general classifications. See *McCready* v. *Virginia*, 94 U. S. 391, 395. Yet Mr. Justice Washington's opinion that the constitutional provision extends only to "those privileges and immunities which are, in their nature, fundamental; which belong, of right, to the citizens of all free governments," seems not to have been disapproved. See *Corfield* v. *Coryell*, 4 Wash. (U. S. C. C.) 371, 380. Thus, rights of a civil rather than of a political character are here protected. Accordingly there would not be included the right to hold public office or even to occupy positions of a public nature. See *Austin* v. *The State*, 10 Mo. 591, 592; 1 Mich. L. Rev. 292–298. As the court in the principal case clearly points out, an executor is a public, or, at least, quasi-public officer. See WHARTON, CONFLICT OF LAWS, 3d ed., § 605. He receives his powers only by the active consent of the courts, is generally allowed a statutory compensation, and is at all times subject to the control and directions of the courts. See CROSSWELL, EXRS. & ADMRS., §§ 5, 177, 181. A statute prohibiting the appointment of a non-resident trustee has been held unconstitutional. *Roby* v. *Smith*, 131 Ind. 342. But trustees deriving their powers wholly from the creators of the trust have in no sense an official character. See WOERNER, AM. LAW OF ADM., 2d ed., § 10.

CONSTITUTIONAL LAW — SELF-INCRIMINATING TESTIMONY. — A state statute, known as the Kansas Anti-Trust Act, compelled witnesses to testify in regard to violations of that statute, and provided that neither should they be liable to criminal prosecutions for any violations of the act about which they testify, nor should their evidence be used against them in any criminal proceedings. *Held*, that the statute is not in violation of the Fourteenth Amendment, which provides "Nor shall any state deprive any person of . . . liberty . . . without due process of law." Two justices dissented. *Jack* v. *State of Kansas*, U. S. Sup. Ct., Nov. 27, 1905.

The state statute could not, of course, prevent the testimony of a witness in state proceedings from being used against him in federal courts for violations of federal statutes. For the purposes of this case, the court assumes that, "if the statute failed to give sufficient immunity from prosecution or punishment" to the witness, it would violate the Fourteenth Amendment. The decision is then reached on the basis that the danger of such prosecution in the federal courts is so "unsubstantial and remote" that it is of no consequence that the statute does not provide against it. This decision is in harmony with the same court's opinion in a previous case, that although a federal statute obliging witnesses to testify secured them no immunity in state courts, yet it did not compel self-incrimination within the terms of the Fifth Amendment. *Brown* v. *Walker*, 161 U. S. 591, 608; see 10 HARV. L. REV. 120. These two cases seem to establish the law that "the legal immunity is in regard to a prosecution in the same jurisdiction; and when that is fully given, it is enough."

CONTRACTS — MASTER AND SERVANT — UNWRITTEN RENEWAL OF A PREVIOUS CONTRACT. — A, under an express contract, employed the plaintiff for

one year at an annual salary. Without further express agreement the plaintiff continued in A's employ for several years, but was discharged in the middle of the year without cause, when A became bankrupt. The plaintiff therefore brings this action against A's assignee in bankruptcy. *Held*, that the plaintiff had a yearly contract with A which entitles him to recover from the defendant for his discharge by A in the middle of the year without cause. *Baker* v. *D. Appleton & Co.*, 95 N. Y. Supp. 125.

The question in this case is essentially one of fact; did the parties renew the agreement? There was no express renewal, but acts may show as unequivocally as words a mutual intent to be bound. Where the facts as to a contract are not in dispute, their interpretation is a question of fact for the court, not for the jury. *Chicago Cheese Co.* v. *Fogg*, 53 Fed. Rep. 72. When one enters the employ of another under a contract for a year's service at an annual salary, and continues in the employment after the expiration of the year, the weight of authority seems to be that this raises a presumption of fact that the parties have assented to a renewal of the agreement. *Adams* v. *Fitzpatrick*, 125 N. Y. 124; *N. H. Iron Factory Co.* v. *Richardson*, 5 N. H. 294. This presumption of fact, if not rebutted, will sustain the conclusion that, as a matter of law, there was such a contract. *Taylor* v. *City of Lambertville*, 43 N. J. Eq. 107. And this contract is not open to objection under the Statute of Frauds. *Tatterson* v. *Suffolk Manufacturing Co.*, 106 Mass. 56.

CRIMINAL LAW — FORMER JEOPARDY — CONVICTION OF HIGHER OFFENSE ON SECOND TRIAL. — On a charge of murder in the first degree, the plaintiffs were convicted of assault by a court of first instance of the Philippine Islands. On appeal to the Supreme Court of those islands, the judgment was reversed and the plaintiffs were convicted of murder in the second degree. *Held*, that the later conviction is not a violation of a legislative provision against double jeopardy. Three justices dissented. *Trono* v. *United States*, U. S. Sup. Ct., Dec. 4, 1905.

The case is of especial interest as being the first decision by the Supreme Court of the United States upon this point, concerning which the state courts are at variance. But see *United States* v. *Harding*, 26 Fed. Cas. 131. It is well settled that an appeal by the accused operates as a waiver of the plea of former jeopardy on a second trial. *United States* v. *Ball*, 163 U. S. 662. The conflict of authority arises as to the extent of such waiver. See WHARTON, CRIM. PLEAD., 9th ed., § 465. The weight of authority is opposed to the decision in question, and regards the accused as waiving the plea of former jeopardy only as to that part of the judgment which convicts him of guilt. *People* v. *Gordon*, 99 Cal. 227; *contra*, *State* v. *Bradley*, 67 Vt. 465. To hold that the plea is also waived as to the acquittal of any higher grades of crime included in the indictment would clearly seem to subject the accused to double jeopardy without his consent and so to violate any provision against such double jeopardy. While the effect of this decision will undoubtedly be to do away with many appeals on petty grounds, it will also tend to discourage those that are *bona fide*.

ELEVATORS — OPERATORS AS CARRIERS — DEGREE OF CARE. — The plaintiff, an employee of a tenant of the defendant, was injured by the falling of an elevator which the defendant maintained and operated, and brought action for damages. At the trial the judge refused to instruct that the defendant was not liable if he had used reasonable care and prudence in the construction, maintenance, and operation of the elevator. *Held*, that it was error to refuse such an instruction. *Edwards* v. *Manufacturer's Bldg. Co.*, 61 Atl. Rep. 646 (R. I.).

It is universally held that a common carrier must exercise a high degree of care. *Readhead* v. *The Midland Ry. Co.*, L. R. 2 Q. B. 412. An operator of an elevator is not a common carrier in the strict legal sense of the term. *Seaver* v. *Bradley*, 179 Mass. 329. But the overwhelming weight of authority is that he owes the same degree of care as a common carrier. *Treadwell* v. *Whittier*, 80 Cal. 574; *contra*, *Griffin* v. *Manice*, 166 N. Y. 188. The argument in the

case under discussion is that common carriers must exercise great care because of the peculiar business in which they are engaged, but that the care required of elevator operators should be only that which is due to persons on premises by implied invitation. But the idea running through all the cases of common carriers and elevators alike is that public policy demands a high degree of care where so many lives are exposed to danger. *The Philadelphia, etc., Rd. Co.* v. *Derby*, 14 How. (U. S.) 468, 486; *Springer* v. *Ford*, 189 Ill. 430. The force of this argument makes the decision of the lower court seem preferable.

EQUITY — INJUNCTION — CONTRACT IN RESTRAINT OF TRADE. — Certain insurance companies entered into an agreement the object of which was to regulate the rates of insurance. The Attorney General sought, in behalf of the public, to restrain them from carrying out the agreement. *Held*, that in the absence of a statute authorizing the Attorney General to bring the complaint, the bill must be dismissed, although the contract was contrary to public policy being in restraint of trade. *McCarter, Atty. Gen.* v. *Firemen's Ins. Co.*, 61 Atl. Rep. 705 (N. J., Ch.).

In New Jersey there is no statute prohibiting contracts in restraint of trade. Nor do such contracts appear to be positively illegal, though they are not enforceable at the instance of either party. Cf. *Albright* v. *Teas*, 10 Stew. (N. J.) 171. It is true that equity, in many cases, has enjoined a clear violation of the rights of the public at the instance of the Attorney General, although he had no express authority by statute to bring the bill. *In re Debs*, 158 U. S. 564; *Attorney-General* v. *Hunter*, 1 Dev. Eq. (N. C.) 12. But in general, if the plaintiff's right or the defendant's wrong is doubtful, a permanent injunction will not issue. *Consolidated Canal Co.* v. *Mesa Canal Co.*, 177 U. S. 296. In New Jersey, at least, the defendant's wrong seems doubtful; it lies entirely within the discretion of the court to determine whether it is too doubtful to warrant the issue of an injunction.

EQUITY — RESCISSION OF CONTRACT FOR MUTUAL MISTAKE OF FACT. — The defendant employed a real estate broker to sell for him property on a certain avenue. The broker pointed out to the plaintiff houses on another avenue as the ones for sale, and after inspection the plaintiff signed a contract calling for the purchase of the first-named property. *Held*, that because of the broker's misrepresentations, whether honest or not, the plaintiff can have the contract cancelled. *Silverman* v. *Minsky*, 109 N. Y. App. Div. 1. See NOTES, p. 290.

EVIDENCE — DECLARATION IN COURSE OF DUTY — ORAL STATEMENT OF DECEASED PHYSICIAN TO PATIENT. — In a suit by a husband for the dissolution of marriage, the wife made counter-charges of cruelty. In order to show the cause of an illness which she wished to prove her husband had been responsible for, she offered in evidence a statement made to her during her illness by the attending physician, who had since died. *Held*, that the evidence is inadmissible. *Dawson* v. *Dawson*, 22 T. L. R. 52 (Eng., Prob., Divorce & Adm., Nov. 10, 1905).

Written statements of a deceased person made in the ordinary course of his duty are everywhere admissible in evidence. 2 WIGMORE, EVIDENCE, § 1518. Oral statements were said by Lord Campbell to be included in this exception to the hearsay rule. *Sussex Peerage Case*, 11 Cl. & Fin. *85, *113. His remark, though not necessary to the decision, has been followed by the English judges. *Reg.* v. *Buckley*, 13 Cox C. C. 293. The present case seems opposed to *Reg.* v. *Buckley*, though it may perhaps be reconciled with it on the ground that a physician frequently refrains from telling his patients the truth about their condition, and that therefore statements made under such circumstances are not so trustworthy as those made under a positive duty to tell the truth. The two cases are otherwise in conflict, however, and the present one may mark the return of the English courts to their old rule. The law on the point in this country is not settled, but shows little tendency to accept the doctrine of *Reg.* v. *Buckley*. *Cf. Williams* v. *Walton and Whann Co.*, 9 Houst. (Del.) 322, 9 HARV. L. REV. 288. At least one case reaches the result of *Reg.* v. *Buckley*,

by calling the statements of a physician as to the illness of his patient a part of the *res gestæ*. *McNair* v. *National Life Ins. Co.*, 13 Hun (N. Y.) 144.

EVIDENCE — HEARSAY — AGE OF WITNESS. — On a trial for statutory rape, the age of the prosecutrix being in issue, objection was made to her competency to prove her own age, on the ground that her knowledge of it was obtained outside of her family, though from a person (B) with whom she had lived as an orphan. *Held*, that the evidence is not admissible. *People* v. *Colbath*, 104 N. W. Rep. 633 (Mich.).

Though the statement may not be in regard to pedigree, and, strictly speaking, is hearsay, the broad view is usually taken that as the statement of a witness regarding his own age is sufficient in practical affairs of life, it should be admissible. *Cheever* v. *Congdon*, 34 Mich. 296. And it will be admitted though his parent is present, and though it appears that his knowledge came from the parent. *Loose* v. *State*, 120 Wis. 115. But the statement of B herself as to the age of a person not a member of her family would not have been admissible. *Simpson* v. *State*, 81 S. W. Rep. 320; see 9 HARV. L. REV. 486. And it follows as a logical step from this rule, that the fact of passing through one more individual, though that one happens to be the person whose age is in question, should not make that admissible which was before inadmissible. *Cf. State* v. *Cougot*, 121 Mo. 458. If the contrary view were taken, it would follow that the rule limiting evidential statements of age to members of the family of the person whose age is in question should be extended to include those who would be likely to know, irrespective of relationship. This would of course be an extension with vague limits, but might be wise in the case of an orphan entirely without family, or where none of the family knew.

ILLEGAL CONTRACTS — CONTRACTS AGAINST PUBLIC POLICY — AGREEMENTS BETWEEN OFFICE-HOLDERS AS TO TERMS OF OFFICE. — At the first election after the death of one alderman of a board of eight (four of whom were elected annually for a term of two years), five were chosen with no specification as to which should have the short term. The question could not be settled by the three aldermen whose terms were not in dispute, since they did not constitute the necessary quorum. One of the new members agreed to take the short term on condition that the others vote for him for president of the board. Elected president, at the end of the year he refused to withdraw. *Held*, that the contract is not contrary to public policy and that the defendant may be compelled to resign. *Hobbs* v. *Upington*, 89 S. W. Rep. 128 (Ky.).

The position of the court in enforcing such a contract must be regarded as extremely questionable. The defendant induced his colleagues to vote for him for president of the board by promising them an undisputed two-year term. If he had offered money for the same purpose, the agreement clearly would have been void as against public policy. *Swayze* v. *Hull*, 8 N. J. Law 54. Similarly, his colleagues induced him to promise to withdraw at the end of the year, by agreeing to vote for him for president. Here again, if they had offered money to procure his withdrawal, the agreement would have been contrary to public policy. *Eddy* v. *Capron*, 4 R. I. 394. The fact that the consideration on each side was political office instead of money does not alter the principles involved. See *Stroud* v. *Smith*, 4 Houst. (Del.) 448. When the substance of a contract is the bartering of public offices for private and unworthy motives, no equitable ground for its specific enforcement can be found.

INSURANCE — RIGHTS OF INSURER — EFFECT OF INSURED'S GRANTING ABATEMENT IN PRICE TO VENDEE. — The defendant agreed to sell to the Corporation of Plymouth certain premises which had been insured by the plaintiff. Before the title was transferred, some buildings were burned; and the insurance was collected by the defendant. Thereafter the defendant released to the Corporation of Plymouth his claim for an amount of the purchase price equivalent to the amount of the insurance money. The plaintiff sued the defendant to obtain the value of this right that was released. *Held*, that it can recover. *Phœnix Assurance Company* v. *Spooner*, [1905] 2 K. B. 753.

Having decided that the vendee of premises that had been burned before the transfer of title has no right to the insurance money which the vendor receives, the English courts were confronted with the alternative of allowing the vendor to recover double compensation for his loss, or of subrogating the insurance company to the vendor's rights against the vendee. *Cf. Rayner* v. *Preston*, 18 Ch. D. 1. The latter alternative was chosen, and the present case merely reënforces that decision. *Cf. Castellain* v. *Preston*, 11 Q. B. D. 380. The courts of this country feeling that the insurance money really stands in the place of the destroyed property, have held that, like the property which it represents, such money belongs in justice to the vendee. *Skinner, etc., City* v. *Houghton*, 92 Md. 68, 82. This view is a departure from the doctrine, which has found favor in England, that a policy of insurance is a contract of personal indemnity. But the American position is justified on equitable grounds, since it places the loss upon the insurance company which has been paid to sustain it, and relieves the vendee from the necessity of paying for what he does not receive.

MORTGAGES — MERGER OF INTERESTS — TRANSFER OF DEBENTURES AFTER PAYMENT. — A company issued debentures as a first charge on its property, agreeing to create no charges in priority to or upon an equal footing with them. Some of these debentures it issued to A, as security for a loan. Later the loan was paid off by the company, and the debentures returned by A, together with blank transfers. The company then, having applications for debentures, transferred these same debentures to the applicants, who paid their full value, and were registered as holders. At the winding up of the company, these transferees claimed equal priority with the other debenture holders. *Held*, that they are not entitled thereto, since their debentures were either extinguished by payment, or if kept alive could not be set up against the other debenture holders. *In re W. Taskers & Sons, Ltd.*, [1905] 2 Ch. 587.

When the owner of property subject to a mortgage acquires the mortgage, equity will prevent the extinction of the mortgage by merger, if an intention to keep it alive can be found, or, in the absence of evidence of intention, if it will be to the owner's advantage to keep it alive, provided it will not perpetrate a fraud on third parties. *Forbes* v. *Moffatt*, 18 Ves. Jun. 390. But since equity will not aid fraud, it has been held that when a mortgage debt is paid by one who is bound to pay it, and upon whom the burden of payment ought to fall, an assignment of it to him operates as a discharge. *Burnham* v. *Dorr*, 72 Me. 198; see also JONES, MORTGAGES, 5th ed., 864. Under this rule, a mortgagor who has acquired a first mortgage made by himself cannot set it up against a subsequent mortgage also made by himself. *Otter* v. *Vaux*, 6 De G. M. & G. 638. It would seem equally unfair to let him set it up against a contemporaneous mortgage made by himself. Even if the company, by registering the transfer, were estopped to deny the validity of the transferred debentures, the other debenture holders are not so estopped. *Mowatt* v. *Castle Steel and Iron Works Co.*, 34 Ch. D. 58.

NEGLIGENCE — DUTY OF CARE — DUTY CREATED BY MUNICIPAL ORDINANCE. — An ordinance regulated the manner of running street cars. *Held*, that a violation of the ordinance is negligence *per se*, and a person injured can bring a civil action based on the breach of the duty imposed by the ordinance. *Sluder* v. *St. Louis Transit Co.*, 189 Mo. 107. See NOTES, p. 288.

NEW TRIAL — GROUNDS FOR GRANTING NEW TRIAL — JUROR'S NOTES OF EVIDENCE. — During the trial of the defendant for murder, a juror for three weeks openly took notes of the testimony in aid of memory. *Held*, that this does not as a matter of law require the setting aside of the verdict. *Commonwealth* v. *Tucker*, 33 Banker and Tradesman 2555 (Mass., Sup. Ct., Nov. 28, 1905).

In the absence of statutes, which provide in several states that jurors may take notes of the evidence, some courts regard note-taking as an improper practice, whereas others consider it allowable or sometimes even commendable, whether in a civil or criminal action. *United States* v. *Davis*, 103 Fed. Rep.

457; *Cowles* v. *Hayes*, 71 N. C. 230; *Thomas* v. *State*, 90 Ga. 437. And in civil cases at least, some jurisdictions permit counsel to request the jurors to take notes of a particular fact or calculation, provided that too much time is not consumed thereby, though the jurors are not required to comply. *Tift* v. *Towns*, 63 Ga. 237; *contra*, *Indianapolis, etc., Rd. Co.* v. *Miller*, 71 Ill. 463. It seems established that even in a murder trial, the verdict will not be set aside unless the fact affirmatively appears that neither the defendant nor his counsel had knowledge of the note-taking, for consent to it is presumed from failure to object. *State* v. *Robinson*, 117 Mo. 649. From the facts in the principal case, the fair inference is that there was knowledge. But the case seems sound in the view that even if there were no knowledge, note-taking by a juror is not illegal, and that so far as it is misconduct, the court will grant a new trial at discretion and not as a matter of law. See *Commonwealth* v. *White*, 147 Mass. 76.

POWERS — EXECUTION BY RESIDUARY DEVISE. — A testator, having a special power of appointment, left a will which purported to dispose of all the property he owned or over which he had any power of disposition. The will did not mention the power, but contained a general residuary clause. *Held*, that the power is executed in favor of the residuary legatees who are members of the class specified by the donor of the power. *Stone* v. *Forbes*, 189 Mass. 163.

The old common law rule, in force in nearly all of the states unless changed by statute, is that a power of appointment is not exercised by a general residuary devise of all the testator's estate. A further intention to appoint must appear. *Hollister* v. *Shaw*, 46 Conn. 248. Massachusetts has departed from the rule in the case of general powers by holding that a residuary devise sufficiently indicates the intention to appoint. *Amory* v. *Meredith*, 7 Allen (Mass.) 397. An effort was made to distinguish the present case because it involves a special power. English decisions make such a distinction in construing the Wills Act. *In re Hayes*, [1900] 2 Ch. 332. The Massachusetts court says that as the intent to exercise the power is sufficiently expressed to satisfy the common law rule, they need not decide the point; but the opinion intimates that the special power would have been treated like a general one if the intent had not been found. North Carolina follows the Massachusetts decisions in a case involving a special power without mentioning the distinction. *Johnston* v. *Knight*, 117 N. C. 122. And Massachusetts will probably refuse to treat the two kinds of powers differently, as there is quite as much reason for holding that the testator intended the residuary legatee to be the appointee in one case as in the other.

PREFERENCES — AT COMMON LAW — EFFECT OF APPOINTMENT OF RECEIVER ON STATE PRIORITY. — A receiver was appointed for an insolvent corporation under a statute vesting him with title to its assets. *Held*, that this cut off the state's right to priority. *State* v. *Williams*, 61 Atl. Rep. 297 (Md.). See NOTES, p. 292.

PUBLIC OFFICERS — RESIGNATION — WITHDRAWAL OF RESIGNATION. — A justice of the peace filed his resignation to take effect in the future. It was at once accepted and notice was given the election commissioners to hold a new election. Later, but before the resignation was to take effect, it was attempted to be withdrawn without the consent of the accepting authority. *Held*, that the resignation was irrevocable. *Murray* v. *State ex rel. Luallen*, 89 S. W. Rep. 101 (Tenn.).

The common law doctrine, prevailing in a majority of the states, requires that a resignation to be effective must be accepted. *Fryer* v. *Norton*, 67 N. J. Law 537. By this view it is merely an offer, which may be withdrawn before acceptance. *State ex rel. Van Buskirk* v. *Boecker*, 56 Mo. 17. But when a resignation intended to operate at once has been accepted, withdrawal is impossible under any circumstances, for the office is vacant and can be filled only according to law. *State ex rel. Bergshicher* v. *Grace*, 113 Tenn. 9. A distinction, however, is taken with reference to prospective resignations. As

the incumbent is not out until the date set, there seems to be no objection to a withdrawal before then, even after acceptance, provided the accepting authority consents and no new interests, such as arrangements for an election, have intervened. See *Biddle* v. *Willard*, 10 Ind. 62. Since the present case falls foul of both these objections, it could scarcely be decided otherwise, but the court rests its judgment entirely on the previous Tennessee decision, cited above, relating to an immediately effective resignation. In states where a resignation is final without acceptance, withdrawal should be allowed in the case of prospective resignations at any time before the operative date, except where new rights have intervened. It has been so held. *State ex rel. Williams* v. *Beck*, 24 Nev. 92.

RES JUDICATA — MATTERS CONCLUDED — ASSIGNEE OF JUDGMENT AS A PRIVY TO GARNISHMENT PROCEEDINGS ON THE JUDGMENT. — A judgment creditor, W, assigned his judgment against H to the plaintiff in the present suit. Before assigning to the plaintiff, W had commenced an action against the defendant in the present action, as garnishee of H, the judgment debtor. The garnishment action failed, and in the present action the plaintiff maintains that a finding in the garnishment proceeding is *res judicata* as between himself and the defendant. *Held*, that the plaintiff was neither party nor privy to the proceedings in the garnishment action, and that the finding in it is therefore not *res judicata* in the present suit. *Allen* v. *Ellis*, 104 N. W. Rep. 739 (Wis.).

The general rule is that an assignee is privy to judgments rendered in suits on the chose assigned if the suits were begun before the assignment. *Corcoran* v. *Chesapeake, etc., Co.*, 94 U. S. 741. The question raised in this case was whether the garnishment action is intimately enough related to the original judgment to bind the assignee of the judgment. The garnishment proceeding was merely auxiliary to execution on the judgment assigned. *Garland* v. *McKittrick*, 52 Wis. 261. That the garnishment proceeding was not specifically assigned is of course not conclusive against its binding the assignee. *Block* v. *Commissioners*, 99 U. S. 686. Furthermore the fact that it was based on the judgment and might have involved a finding that the judgment was void seems to show its necessary connection with the judgment. *Beaupre* v. *Brigham*, 79 Wis. 436. An additional consideration pointing to this result is that the assignee would be entitled to the proceeds of the garnishment. *Bullitt & Fairthorne* v. *Methodist Episcopal Church*, 26 Pa. St. 108. The contrary view would seem to allow the assignee to bring a new garnishment action against the same garnishee, raising the same issues; and successive assignees would have indefinitely the same power of continual litigation. This is against the fundamental policy of the law of *res judicata*. *Cf. Bisland* v. *Griffin*, 9 La. An. 150.

RES JUDICATA — PERSONS CONCLUDED — CO-DEFENDANTS. — A decree in equity declared that C, one of two defendants, was entitled to a certain sum of money which the plaintiff A claimed as judgment-creditor of B, the other defendant. B now brings this action against C for the same sum. *Held*, that the decree operates as a bar to his right, on the principle of *res judicata*. *Ellis* v. *Cole*, 105 N. Y. App. Div. 48.

If A's claim against C is derived from and is as great as that of B against C, and if A fails to establish his case, then B is barred from asserting his claim against C in a subsequent suit. *Cohen* v. *Simpson*, 32 S. W. Rep. 59. In the case under discussion the decree in equity necessarily involved the decision that C was entitled to the money as against B; for otherwise A would have been entitled to it, since his claim was admitted to be as great as that of B. The provision in the Code (§ 521) requiring a defendant to notify his co-defendant when he wishes to establish his rights against such co-defendant as well as against the plaintiff, does not apply to cases where these rights are necessarily involved in a judgment for or against the plaintiff, since the Code provision was not intended to interfere with the principles of *res judicata*. *Pratt* v. *Johnston*, 59 N. Y. App. Div. 52.

RESTRICTIVE AGREEMENTS AS TO USE OF PROPERTY — CHANGE IN CHARACTER OF LOCALITY AS GROUND FOR REFUSING INJUNCTION. — The de-

fendant was the owner of land subject to a covenant, limited in duration to twenty-five years, that there would not be built upon it "any tenement, apartment or community house." After nineteen years the neighborhood had ceased to be desirable for private residences, so that the enforcement of the covenant would cause great hardship to the defendant without benefit to the plaintiff's property. *Held*, that equity will not enjoin a threatened breach. *McClure* v. *Leaycraft*, 183 N. Y. 36.

The decision of the lower court, which is here reversed, was commented upon in 18 HARV. L. REV. 472.

RULE AGAINST PERPETUITIES — CY-PRÈS DOCTRINE. — The testator devised his freehold estate to A for life, remainder to A's eldest son for life, remainder to the first and other sons of A's eldest son in tail male successively, remainder to the other sons of A successively subject to the same limitations, remainder to the daughters of the first and other sons of A successively in tail as tenants in common, remainder to the daughters of A in tail as tenants in common, remainder to A, his heirs and assigns, forever. A died without ever having had issue. As the devises to the sons of A's sons were void for remoteness, the executors proposed to substitute the following limitations in order to effectuate the testator's intent: to A for life, remainder to A's sons successively in tail male; if on the determination of prior estates there shall be a failure of issue of the sons of A other than daughters or issue of daughters, then to A's sons successively in tail general; remainders thereafter as in the original will. *Held*, that the substitution be not accepted. *In re Mortimer*, [1905] 2 Ch. 502.

The doctrine of *cy-près*, which has been applied in order to mitigate the severity of the rule against perpetuities, aims to effectuate the intention of the testator. It will not be invoked if its application results in benefiting persons whom the testator did not intend to benefit; but it may be used even though the order in which the devisees take is thereby changed. See GRAY, RULE AGAINST PERP. §§ 647, 649. In order to give effect to the testator's intention in the present case an unusual condition transforming vested into contingent remainders was invented. Had the court been inclined to look with favor upon the doctrine, such an expedient would probably have been sanctioned. The decision, however, is in harmony with the disposition of the English court to restrict the doctrine of *cy-près*. *Cf. In re Richardson*, [1904] 1 Ch. 332.

STATUTES — INTERPRETATION — WHETHER APPOINTEE OF LEGISLATURE MAY EXTEND ITS POWER BEYOND EXACT WORDING OF STATUTE. — A statute gave the county courts of the state power, subject to a local option law, to grant liquor licenses to adults of good moral character. The plaintiff was granted a license by the county court of his county, with the provision that the license might be revoked by the same court if the plaintiff violated the local liquor laws. The plaintiff broke the Sunday law and the county court revoked his license. *Held*, that the plaintiff has no legal ground for complaint. One justice dissented. *Sarlo* v. *Pulaski County*, 88 S. W. Rep. 953 (Ark.).

A state legislature, under its police power, can control the sale of liquor within the state, and may properly delegate to subordinate bodies the right of local control. *Metropolitan Board of Excise* v. *Barrie*, 34 N. Y. 657. It being admitted that the legislature in the present case might properly have given the county court power to grant revocable licenses, the question remains, did it in fact do so? *Cf. Schwuchow* v. *City of Chicago*, 68 Ill. 444. The courts, in interpreting a statute, usually assume, in the absence of a strong reason for a contrary holding, that the legislature intended to reserve what it did not grant. *Lantz* v. *Hightstown*, 46 N. J. Law. 102. The present decision, however, asserts that power to grant to proper persons includes power to revoke. The only case on this precise point is in accord. *Gerstlauer's License*, 5 Pa. Dist. Reps. 97. The view of the dissenting justice, that until power is expressly, or by necessary implication granted, the court should not assume it to have been granted, seems to conform more closely to the general current of statutory interpretation. The suggestion that the welfare of the community demands the broader construction is not controlling, inasmuch as another

statute gives municipal corporations the power to regulate liquor-selling. For a discussion of another phase of the same general subject, see 19 HARV. L. REV. 203.

TAXATION — STATE AGENCY — TAXATION BY FEDERAL GOVERNMENT. — The State of South Carolina, in its efforts to regulate the liquor traffic, established a dispensary system, and prohibited the sale of liquor by any but its own officers. Under its internal revenue system, the United States imposed upon the dispensers a license tax, from which the State claimed exemption, on the ground that the dispensary system was a means employed by it in the execution of its police power. *Held*, that the tax is valid. *State of South Carolina* v. *United States*, U. S. Sup. Ct., Dec. 4, 1905. See NOTES, p. 286.

THEATRES AND AMUSEMENTS — TICKETS OF ADMISSION — RIGHTS OF HOLDER. — The plaintiff, a licensed ticket speculator, bought theatre tickets of the defendant on which was a printed statement that, if they were sold on the sidewalk, they would be rejected at the door. While the plaintiff was attempting to sell on the sidewalk, agents of the defendant warned prospective purchasers not to buy. The plaintiff brought a bill to restrain the defendant from interfering with his business. *Held*, that the bill be denied, as no right of the plaintiff is being infringed since the express condition of the contract of purchase invalidated the ticket if sold on the sidewalk. *Collister* v. *Hayman*, 34 N. Y. L. J. 871 (N. Y., Ct. App., Dec. 5, 1905).

For a discussion of the principles involved, see 14 HARV. L. REV. 455.

TRESPASS TO REALTY — WHO MAY SUE — MORTGAGEE WITH RIGHT OF ENTRY AT TIME OF TRESPASS. — *Held*, that after entry by a mortgagee of land his possession relates back to the time at which his legal right to enter accrued, so as to enable him to support an action against a wrongdoer for a trespass committed at a time antecedent to the entry. *Ocean Accident, etc., Corporation* v. *Ilford Gas Co.*, [1905] 2 K. B. 493.

The old doctrine allowing a disseisee on re-entry to sue for trespasses committed during his dispossession has been given a broader scope in a case holding that the possession of an heir relates back to the time his right of entry accrued. *Litchfield* v. *Ready*, 5 Exch. Rep. 939; *Barnett* v. *Earl of Guildford*, 11 Exch. Rep. 19. The only difficulty of the present case lies in the fact that here the plaintiff does not have the full and unincumbered legal title; but since possession is the essential point in trespass, and the plaintiff had here a legal right to enter and take possession at the time of the trespass, the case seems to fall within the spirit of, as well as within the doctrine laid down in, the former decision. See *Anderson* v. *Radcliffe and Walker*, E. B. & E. 806. Several American cases are based on the even broader rule that recovery may be had when the mortgagor has not yet entered, providing only that his right of entry dates back to the time of the trespass. *Harris* v. *Haynes*, 34 Vt. 220. If this is a departure from the original conception of trespass, it seems desirable as promoting justice and avoiding the technical distinction between case and trespass.

TRUSTS — CESTUI'S INTEREST IN THE RES — CESTUI'S RIGHT TO BRING ACTION FOR DAMAGES TO REALTY. — In a division of land between A and B, certain lots were set apart to A, the legal title to which remained in B as trustee. The defendant constructed an embankment in front of and parallel to these lots, impeding ingress and egress to and from the highway and damaging the saleable value of the lots. In an action for damages brought by A, the defendant demurred. *Held*, that A himself may maintain the action. *Yates* v. *Big Sandy Ry. Co.*, 89 S. W. Rep. 108 (Ky.).

A *cestui que trust*, though the absolute owner in equity, is regarded at law as a mere stranger. PERRY, TRUSTS, 5th ed., § 328. If he is in possession, doubtless he, like any other possessor, may have trespass for an entry by a wrongdoer. *Stearns* v. *Palmer*, 10 Met. (Mass.) 32. But except in the rare instances where it is presumed that the legal title has been surrendered to the *cestui*, he cannot maintain ejectment. *Langdon* v. *Sherwood*, 124 U. S. 74;

see *Den* v. *Bordine*, 20 N. J. Law 394. Neither can he bring an action for damages to realty held in trust. *Davis* v. *Charles River Co.*, 11 Cush. (Mass.) 506. Where a plaintiff held real estate under a contract of purchase, on which all payments had been made, so as to entitle him to a deed, in an action for damages to the land, the court, though recognizing the necessity of joining the legal owner, allowed the *cestui* to recover on the ground that the defendant had failed to object at the proper time. *F., E. & M. V. R. Co.* v. *Setright*, 34 Neb. 253. But the principal case, which is not rested by the court on any statute, seems to go farther than any other. It disregards the true nature of the trust relation in suggesting that the rights of the *cestui* are here analogous to those of a lessee.

TRUSTS — POWERS AND OBLIGATIONS OF TRUSTEES — LIABILITY OF TRUSTEE ACTING UNDER ADVICE OF COUNSEL. — A joint stock company acting as trustee paid under legal advice part of the trust funds to the wrong parties. *Held*, that the trustee is personally liable. *National Trustees, etc., Co.* v. *General Finance, etc., Co.*, 54 W. R. 1 (Eng., Privy Council, May 16, 1905).

A trustee must use such care in the management of the trust fund as men of ordinary prudence use in their own affairs. That a trustee has taken the advice of counsel is strong evidence of such prudence. *Neff's Appeal*, 57 Pa. St. 91. But in the distribution of the trust estate, a stricter liability is enforced. Where a trustee makes a payment to a person not authorized, he is liable personally for the misapplication; and this liability will follow, even though he acted in good faith and under the advice of counsel. *Doyle* v. *Blake*, 2 Sch. & Lef. 231, 243; *Owings* v. *Rhodes*, 65 Md. 408. In the latter event, however, it seems that the court will not impose costs on the trustee. *Angier* v. *Stannard*, 3 Myl. & K. 566. Where payment should be made according to the law of a foreign country, a trustee is not liable for a mistake as to that law unless the provision is called to his notice. *Leslie* v. *Baillie*, 2 Y. & C. C. C. 91. The apparent stringency of the general rule is relieved by the fact that a trustee may, in case of doubt, refuse to distribute the trust fund without the sanction of the court. *Re Wylly's Trusts*, 28 Beav. 458.

WATERS AND WATERCOURSES — NATURAL WATERCOURSES: RIPARIAN RIGHTS — EXTINGUISHMENT OF RIPARIAN RIGHTS. — *Semble*, that a transfer of a right to water in a stream is a transfer of real property within the Statute of Frauds, but such transfer, though by parol, is excepted from the statute by equity when there has been part performance under an agreement to give a license to divert. *Churchill* v. *Russell*, 82 Pac. Rep. 440 (Cal.). See NOTES, p. 293.

BOOKS AND PERIODICALS.

I. LEADING LEGAL ARTICLES.

THE RELATION OF CUSTOM TO LAW. — The retrospective operation of judicial decisions in affecting rights which have accrued prior to their adoption has been explained by various theories. The early English judges, holding themselves incompetent to add to the common law, decided new questions of law that arose concerning past transactions, under the pretense of following precedents which did not in fact exist. In modern times judges have explained this effect of their decisions by the doctrine that judges do not make the law, but merely interpret a body of rules already existing independently of their decision. Upon either of these assumptions the court merely applies a pre-existing rule, however novel the question presented for its judgment. This retrospective effect of a decision and the theories by which it is sought to be explained furnish plausible grounds for the doctrine that customs which have